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U.S. DEPARTMENT OF JUSTICE

No. 76-87

In the Supreme Court of the United States

October Term, 1976

LIZZO EMMEL KIRWAN, PETITIONER

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

ROBERT H. ROSE,
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Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-417

LIZZIE ETHEL KIELWEIN, PETITIONER

v.

UNITED STATES OF AMERICA

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT***

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner, who had filed an administrative claim under the Federal Tort Claims Act for \$25,000, brought an action in federal district court and was awarded damages of \$123,578.90 for a shoulder injury suffered in the course of surgery at a Navy hospital. The United States appealed, asserting that 28 U.S.C. 2675(b), under the circumstances of this case, prohibited an award of damages in excess of the administrative claim. The court of appeals reversed.

1. Petitioner, the wife of a Marine sergeant, underwent neck surgery at a Navy hospital in October 1970. Immediately thereafter she began to complain of a drooping shoulder and a troublesome left arm. She was advised as early as February 24, 1971, that the spinal accessory nerve in her neck, which controls the motor function and support of the shoulder, had been damaged

or severed, presumably during surgery (Pet. App. 23). By March 30, 1971, she had been told that the injury could not be repaired by resuturing the nerve endings (Pet. App. 24). While some doctors hoped that petitioner's condition might be ameliorated by an operation to reconstruct her back muscles, a neurosurgeon hired by petitioner's counsel reported on September 10, 1971, that the injury was permanent, expressing his opinion that a reconstruction of petitioner's back muscles would not bring relief (Pet. App. 24). Shortly thereafter, on October 1, 1971, petitioner filed an administrative claim with the Department of the Navy, seeking damages of \$25,000 for a drooping left shoulder and "permanent disability to the left arm" (Pet. App. 25). Other physicians later confirmed that her injury was permanent.

When no action was taken on her administrative claim, petitioner filed suit in the United States District Court for the District of South Carolina under the Federal Tort Claims Act (Pet. App. 25). The district court ruled that petitioner did not learn of the permanency of her injury until after filing her administrative claim, and that this subsequent knowledge constituted an "intervening fact" within the meaning of 28 U.S.C. 2675(b) (Pet. App. 17). That statute permits recovery in excess of the administrative claim only "where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim."

The court of appeals reversed (Pet. App. 22-30), holding that the finding of fact made by the district court with respect to the time at which petitioner learned of the permanency of her injury was clearly erroneous.

2. Contrary to petitioner's assertions (Pet. 7-9), this case does not involve an important issue of federal law; rather, it turns solely on whether a finding of fact, concerning the date on which petitioner learned her injury was permanent, was clearly erroneous.¹ Such factual determinations do not present a proper issue for consideration by this Court. *United States v. Johnston*, 268 U.S. 220, 227.

In any event, the record fully supports the court of appeals' decision. Petitioner was told by Dr. Baird on March 30, 1971, that her condition was permanent and that it would be inadvisable to attempt to resuture the severed nerve in her neck (Pet. App. 24). Indeed, the very language of petitioner's administrative claim, seeking recompense for "permanent disability to the left arm," demonstrates her knowledge at that time.

The district court thus clearly erred in finding that at the time she filed her administrative claim petitioner did not know that her injury was permanent.²

¹Petitioner also contends (Pet. 9-11) that the instant decision conflicts with a decision of the Fifth Circuit in *United States v. Alexander*, 238 F. 2d 314, "as to the proper interpretation and application of * * * 28 U.S.C. 2675(b)." There is no conflict. In *Alexander* the court found that the plaintiff there did not have knowledge of the extent of his injuries at the time that he filed his administrative claim, a finding that, as the court of appeals correctly held, the record in this case does not support as to petitioner.

²While the district court found that petitioner did not learn of the permanency of her injury until after filing her administrative claim, and that this constituted an "intervening fact," the court made a concurrent finding that petitioner reasonably should have known of the permanency of her injury prior to filing her claim (Tr. 541). The district court thus construed "intervening fact" to include any new evidence, whether or not it was reasonably discoverable. This interpretation seems inconsistent with 28 U.S.C. 2675(c), which limits damage awards in excess of

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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administrative claims to cases in which newly discovered evidence is "not reasonably discoverable at the time of presenting the claim to the federal agency." The court of appeals did not reach this question.